Proposed Rulemaking -- Clean Water Act
Section 401 Water Quality Certification Program

State Water Resources Control Board (State Board)

Responses to Public Comments -- III

("Late" Comments Received After Either of Two Official Public Comment Periods and/or Agency Adoption of the Regulations)

Initial and Subsequent Comment Periods:

April 23, 1999 to June 8, 1999 (47 days)
December 24, 1999 to January 14, 2000 (22 days)

State Board Adoption of the Proposed Revised Regulations:

February 17, 2000

Abbreviations/Acronyms/Symbols:

(II) -	Referring to the second/final draft proposed certification regulations (used to differentiate comments received as of June 8, 1999 [given no special numeric designation] from those received as of January 14, 2000 [designated with the "(II)"])
(III) -	Used to designate comments received after either of two scheduled public comment periods.
CCR -	California Code of Regulations
CEQA -	California Environmental Quality Act
CFR -	Code of Federal Regulations
Staff -	State Board Staff
TMDL -	Total Maximum Daily Load
USC -	United States Code

RESPONSES TO COMMENTS

COMMENTER M. (III)

Affiliation:	Bay Planning Coalition
Commenter:	Ellen J. Johnck
Title:	Executive Director
Address:	303 World Trade Center San Francisco, CA 94111
Verbal Comments:	Oral testimony given at State Board Workshop, February 2, 2000
Comment M-16 (III):	**Support voiced for delegation of certification authority to the Regional Boards and for the overall rulemaking effort.**
Response:	Comment noted.

Comment M-17 (III): **The Commenter inquired about a State Board response to her original (May 29, 1999) comments on this rulemaking.**

Response: State rulemaking procedures dos not require that agencies release a response-to-comments document to commenters. (Commenters must, however, be sent any substantive revisions to the proposed regulations.) Staff intends to (a) provide copies of responses to all commenters and (b) put the response-to-comments documents on the State Board web page, once these documents are finalized.

Comment M-18 (III): **The Commenter questions denial without prejudice when the certifying agency is faced with procedural difficulties and expiration of the federal time limit for certification.**

Response: See responses to Comments C-2, F-33 (II), and M-2.

Comment M-19 (III): **The need for applicants to supply and agencies to review environmental (CEQA) documentation is discussed.**

Response: Comment noted.

Comment M-20 (III): **"Aggrieved person" needs to be defined.**

Response: See responses to Comments C-6 and C-7. (See also response to Comment L-2.)

Comment M-21 (III): **While the proposed regulations appear to be ready for adoption, a roundtable should be convened among the State and Regional Boards, the Resources Agency, California Environmental Protection Agency, and Corps on the issue of permit/certification time limits.**

Response: This comment is outside the scope of this rulemaking. However, Staff agrees with the suggestion and will work to promote it in the future.

COMMENTER S (III).

Affiliation: Southern California Edison
Commenter: Tara Prabhu
Title: Environmental Specialist
Address: P.O. Box 800

2244 Walnut Grove Avenue
Rosemead, CA 91770

Written Comments: July 9, 1999 Letter
2 pages

Comment S-31 (III): The following definition for "certifying agency" should be added to the proposed regulations:

"Certifying Agency means the State Water Resources Control Board or the Regional Water Quality Control Board that will act upon the certification application."

Response: The proposed definition is unnecessary. See, also, response to Comment R-18.

Comment S-32 (III): The following definition for "discharge" should be added to the proposed regulations:

"Discharge means any addition of any pollutant from a point source into waters of the United States."

Response: The proposed definition is neither accurate or necessary. See response to Comment S-2.

Comment S-33 (III): The following definition for "aggrieved person" should be added to the proposed regulations:

"Aggrieved Person means the applicant or a person who participated in the certification process."

Response: The proposed definition is unnecessary. See responses to Comments C-6 and C-7, but also D-5.

COMMENTER U (III).

Affiliation: Kahl Pownall Advocates
Commenter: Craig S. J. Johns
Address: Research Consultants and Advocates
1115 11th Street, Suite 100
Sacramento, CA 95814

Written Comments: January 27, 2000 Letter
3 pages

Comment U-4 (III): **Subsection 3835(a) should require the certifying agency to state in writing what additional information is required to make an application "complete."**

Response: First, the Commenter is reminded that section 3835 applies to several certification programs, while section 3856 language applies only to the water quality certification program. Secondly, proposed section 3835(a) already states that the applicant must be promptly notified of any additional information or action needed to complete the application. The recommendation is therefore unnecessary.

Comment U-5 (III): **The proposed regulations should indicate that a failure to respond to an application after 30 days means that the application must be deemed "complete."**

Response: See response to Comment D-2.

Comment U-6 (III): **Subsection 3835(c) should include the provision that an applicant may waive his/her right to determination of the "completeness" of an application within 30 days.**

Response: Government Code subsection 65943(d) grants applicants and state agencies the ability to reach mutual decisions to extend the 30-day period. The proposed regulations, of course, do not countermand that statutory authority. However, they also do not specifically encourage it, because it could result in individual application processes exceeding a certification time period allowed by federal agency rules. Therefore, no change to the proposed regulations is necessary or advisable.

Responses to Comments -- III

Comment U-7 (III): **Section 3835(b) should make clear that voluntary withdrawal of an application for certification removes the pending request altogether.**

Response: The Commenter's objections appear to be more appropriately directed at the U.S. Army Corps of Engineers, which must adhere first to federal laws and regulations. The ability of the proposed State regulations in this case to control Corps' policies is questionable. Even if this were not so, the Commenter provides no alternative language to aid in addressing the perceived problem. Regardless, Staff intends to continue to work with the Corps's Pacific Division to address this and other certification issues (see comments provided by Commenter G).

COMMENTER W (III).

Affiliation: Sempra Energy
Commenter: Fredrik J. Jacobsen
Title: Senior Environmental Specialist
Address: 101 Ash Street
San Diego, CA 92101-3017

Written Comments: February 1, 2000 Letter (3 pages)
February 1, 2000 FAX (4 pages)

Responses to Comments -- III

Comment W-1 (III): **The Commenter objects to the subsection 3856(h)(8) requirement for information on previous and future projects by the applicant.**

Response: See responses to Comments F-9, R-3, R-5, R-8, R-31, R-32, S-19. Cumulative impacts upon a watershed may result from large or small projects. Furthermore, Staff disagrees that impacts to water quality from all projects everywhere under Nationwide Permits are individually or cumulatively insignificant, or that this requirement need be burdensome to applicants. The vast majority of applicants plan to implement only one project in a watershed. Those that intend more than one project impacting the same water body(ies) should, under CEQA, normally supply such information to approving agencies. However, such is not always the case (see response to Comment F-9). Since, under CEQA and the Clean Water Act, a certifying agency must evaluate cumulative water quality impacts, it is appropriate that the regulations include this requirement.

COMMENTER X (III).

Affiliation: Lawyers for Clean Water
Commenter(s): Layne Friedrich (signatory), Kimberly Lewand, Daniel Cooper
Address: P.O. Box 29921
San Francisco, CA 94129

Written Comments: February 14, 2000 FAX (5 pages)

Comment X-1 (III): **The proposed regulations should specifically reference, at a minimum, several "water quality standards"--including antidegradation, the National and California Toxics Rules, regional basin plans, and TMDLs--as well as appropriate requirements of Federal law.**

Response: This recommendation is unnecessary. By law Clean Water Act section 401 certification denotes (a) compliance with sections 301, 302, 303, 306, and 307 of the Clean Water Act and (b) establishment of conditions to ensure compliance with these sections and "any other appropriate requirement of State law." The "standards" proposed by the Commenter(s) (e.g., compliance with TMDLs) have been adopted pursuant to sections of the Clean Water Act that are already listed in the proposed definition (§ 3831(v) proposed).

Comment X-2 (III): **The Commenter(s) alleges that without revision the proposed regulations will fail to prohibit certification of discharges that will contribute to violation of water quality standards.**

Response: The proposed regulations already clearly state that in order to be certified a discharge must comply with water quality standards. The recommendation is therefore unnecessary.

The Commenter(s) relies on a regulation (40 CFR § 122.4) which specifically applies to National Pollutant Discharge Elimination System (NPDES) permits (see section title, CFR § 122.4). Where a discharge is subject to the NPDES program, compliance with this regulation (e.g., for the issuance of NPDES permits) is required pursuant to section 301 of the Clean Water Act. Were both certification and the NPDES program to apply to a project, the proposed State certification regulations would include the requirements of section 301 as part of "water quality standards and other appropriate requirements" (see proposed §§ 3831 (u) and (v)).

However, because NPDES permits ordinarily are issued by the State, not by a federal agency, NPDES permits are only rarely subject to water quality certification in California. The regulation relied on by the Commenter(s) is not directly applicable to other federal permits or to certifications. Nonetheless, the Commenter(s)' basic point, that compliance with water quality standards be addressed, is already covered by the proposed regulations. Water quality standards have been determined to include beneficial use designations, narrative and numeric water quality objectives, and antidegradation policies (*PUD No. 1 of Jefferson County* v. *Washington Department of Ecology* (1994) 511 U.S. 700, 114 S.Ct. 1900).

Comment X-3 (III): **The proposed regulations should specify exactly how a certification decision will be reached.**

Response: The regulations already specify how a certification decision will be reached. Section 3859, as proposed, requires that:

1. Certification must be either issued or denied before the federal time period expires. (§ 3859(a).)

2. If it is to be issued, conditions be must added, if necessary, in order to ensure that possible project discharges will comply with "water quality standards and other appropriate requirements." (§ 3859(a).)

3. If certification is to be issued, and if no conditions are to be added, then it must have been determined that possible discharges will comply with "water quality standards and other appropriate requirements" without the need for such conditions. (§ 3859(b).)

No greater specificity is needed.

Comment X-4 (III): **The proposed regulations should require an applicant to provide "verifiable data."**

Response: Such a degree of specificity is unnecessary, as certification should not be issued unless the agency is reasonably sure that water quality standards will be complied with. It will be the responsibility of the water quality agencies to properly assess a request for certification and all supporting materials from applicants and interested parties. (See, also, response to Comment X-5 (II)) Should the public disagree with a certification action, the regulations have been revised to allow aggrieved parties to request appropriate reconsideration of a (Regional Board) decision to the State Board.

Comment X-5 (III): **The proposed regulations fail to place on the applicant the burden of proof that discharges will comply with water quality standards.**

Response: Under the proposed regulations the applicant is clearly responsible for producing the information necessary to demonstrate compliance with the requirements for water quality certification. The regulations further specify that certification may be denied if the necessary information or required environmental documentation is not available before the expiration of the certification period. Nothing more is needed in this regard.

Comment X-6 (III): **The proposed regulations do not use language consistent with the Clean Water Act. The standard should be "cause or contribute" not "will not comply."**

Response: The (actual) phrase "caused or contributed" is used only within Clean Water Act section 311 ("Oil and hazardous substances liability"), in particular subsection (h) ("Rights against third parties who caused or contributed to discharge") (33 USC § 1321(h)). This does not set a "standard" for water quality certification (or other programs in the Act). Rather, the true standard set in Clean Water Act section 401 is for discharges to "comply" with water quality standards (33 USC § 1341(a)).

Comment X-7 (III): **The proposed regulations should not allow "general" certification.**

Response: Nothing in the Clean Water Act prohibits general certification, which is intended to streamline the certification program when necessary, and only where appropriate. To this end general certification should only occur after strict criteria (proposed §§ 3861(b)-(d)) are satisfied.

Comment X-8 (III): **The proposed regulations do not include any public participation process.**

Response: On the contrary, at least two processes are currently proposed, one to alert the public to certification applications (23 CCR § 3858 proposed), as required by federal law (33 USC § 1341(a)(1)), and one regarding petitions for reconsideration of certification decisions (e.g., 23 CCR § 3867 et seq. proposed). There is also the implied opportunity for public involvement through an optional Regional Board meeting process. As further evidence, note that other comments actually addressed the public process proposed in the regulations (e.g., see Comment N-9).

Comment X-9 (III): **The notice for this rulemaking process was inadequate.**

Response: Not true. Efforts to notify the public met or exceeded statutory and regulatory requirements. When it opened the rulemaking record Staff:

1. Published a Notice of Rulemaking through the Office of

Administrative Law on April 23, 1999;

2. Mailed notices of the public hearing to non-duplicative listings from almost 10,000 addresses in 12 separate mailing data bases[1/] maintained at the State Board;

3. Published notices of the planned June 8, 1999 public hearing and information about the proposed rulemaking in four major California newspapers (San Francisco Chronicle, Los Angeles Times, Riverside Press-Enterprise, Sacramento Bee) on May 3, 1999.

4. Noticed and made available the proposed regulations on the State Board web site, www.swrcb.ca.gov;

5. Received comments from April 23 to June 8, 1999; and

6. Held, on its own motion, a special hearing to solicit public comments on the proposed regulations on June 8, 1999.

During the initial 47-day notification period, attempts were made to contact "Keeper" groups. Using the State Board's mailing lists of interested parties, notices were sent to (then) representatives of the San Francisco Baykeeper Organization, "Heal the Bay" in Santa Monica, and Santa Monica Baykeeper. Staff now understands that some or all of those addresses may have been out of date. But the State Board updates addresses promptly upon being notified by its public clients. In the absence of proper change-of-address notification from the public, the agency must assume that its mailing addresses are accurate.

Further efforts to communicate with the public continued during the later rulemaking process. In response to the initial public comments, and following the June 8, 1999 State Board public hearing, Staff:

1/ The twelve mailing lists are maintained for the public interested in being notified about: "Areas of Special Biological Significance" (State Board Mailing Code [MC] 0024; 570 listees), "Basin Plans" (MC-0013; 834), "Bay and Estuaries" (MC-0026; 766), "Clean Water Strategy" (MC-0006; 2350), "Dredging" (MC-0045; 299), "Mining" (MC-0049; 722), "Non Point Source" (MC-0081; 1628), "Siltation" (MC-0052; 360), "Urban Runoff" (MC-0054; 603), "Instream Beneficial Uses"(MC-0057; 497), "License or Permit Changes" (MC-0058; 447), and "Regulations" (MC-0018; 716) issues. Total: 9,792 listings. (Some listees are on more than one list.)

7. Announced and recirculated revised regulations on December 24, 1999 to persons who had provided prior written comments or testimony, and to those who had requested subsequent notification;

8. Solicited public comment on the revised proposed regulations, from December 24, 1999 to January 14, 2000 (21 days);

9. Posted the new revisions on the State Board web site;

10. Mailed notices of a public State Board workshop (February 2, 2000), where the proposed revised regulations would be discussed, to over one thousand addresses (including the San Francisco Baykeeper);[2/] and

11. Mailed notices of a public State Board meeting (February 17, 2000), where adoption of the proposed revised regulations would be voted on, to over 1,200 addresses (including the San Francisco Baykeeper).[3/]

In short, the State Board provided notice well beyond the legally-required minimum.

COMMENTER X (III) (further communication).

Affiliation:	Lawyers for Clean Water
Commenter:	Daniel Cooper
Address:	c/o San Francisco Baykeeper Presidio, Building 1004 P.O. Box 29921 San Francisco, CA 94129
Written Comments:	(dated both) February 25 and 28, 2000. Received February 28, 2000. FAX (6 pages) (dated) February 25, 2000. Received February 28, 2000. Letter (4 pages)

2/ Staff used the standard State Board workshop notice mailing list (State Board Mailing Code 0002 [1026 entries], maintained at public request).

3/ Staff used the standard State Board meeting notice mailing list (State Board Mailing Code 0001 [1260 entries], maintained at public request).

Comment X-10 (III): **Notice and hearing requirements were not observed.**

Response: See response to Comment X-9 (III).

Comment X-11 (III): **According to the Commenter, there is an emerging pattern at the State Board of non-compliance with public participation requirements.**

Response: This issue is, for the most part, outside of the scope of this rulemaking process. Those aspects of the comment which are pertinent are addressed elsewhere (e.g., Comment X-9 (III)).

Comment X-12 (III): **Background comments:**

1. **The "Keeper" groups only first heard of this rulemaking on January 31, 2000.**

2. **Written notice of the revised proposed regulations (second round) went [inappropriately] only to those that had commented on the first draft over a year ago.**

3. **Over the "Keeper" groups' objections, the State Board at its February 2, 2000 workshop made adoption of the proposed regulations a "consent" item for the February 17, 2000 State Board meeting.**

4. **The "Keeper" groups faxed written comments opposing the planned regulations on February 14, 2000, per State Board web-page notice requirements. This material was not distributed to the State Board and staff until February 16, 2000, the night before the meeting.**

5. **Despite indications that the "Keeper" groups' representative would arrive (late) to protest the proposed regulations, the State Board did not remove the item from the consent list and adopted the regulations without waiting to hear from the "Keeper" groups.**

Response: 1. Staff is frankly surprised that, despite an extensive effort

to alert the public to this rulemaking, starting on April 23, 1999, the "Keeper" groups only learned of this effort in January 2000. See response to Comment X-9 (III).

2. Section 44 of Title 1 of the California Code of Regulations provides that notice of a sufficiently-related change to proposed regulations need only be mailed to those who (a) testified at a prior hearing, (b) submitted written comments at that hearing, (c) submitted written comments during the prior 45-day public comment period, and (d) requested notice of the availability of such changes. As detailed in Comment X-9 (III), Staff met and exceeded these requirements.

3. As explained to the "Keeper" groups representative beforehand, this agency had already received and addressed timely comments during two previous public review periods. In the absence of meaningful new public testimony, and with all Members in agreement, the State Board elected to proceed with the approval process, as is standard practice. While Staff communicated the "Keeper" groups' concerns, as explained elsewhere, upon review these were not considered significant.

4. The State Board web-page announcement requests that interested parties fax written comments to the State Board's Administrative Assistant ("916-657-0932"). The "Keeper" groups mistakenly faxed their comments to another staff person's fax number (916-657-2127). This error caused the comments to be overlooked until a phoned inquiry by the "Keeper" groups late in the working day on February 16, 2000. Concerned Staff immediately circulated the faxed comments to the State Board and executive staff and they <u>were</u> reviewed prior to the State Board meeting on February 17, 2000. Staff fully expected the "Keeper" groups representative to attend that meeting.

5. Following standard State Board meeting procedures, and after giving participants the opportunity to request that an item be removed from the "consent" calendar, the State Board voted to adopt all uncontested items, including the proposed regulations.

At that time, State Board personnel were unaware that a "Keeper" groups representative would arrive late. In fact, that representative did not arrive until after adjournment of the meeting. However, State Board Members and senior managers did receive and had considered the "Keeper" groups' written comments before the meeting. Hence, Staff believes that the outcome would have been the same.

Comment X-13 (III): **In light of administrative procedures laws and regulations, the State Board staff failed to provide adequate notice, properly consider the "Keeper" groups' comments, or modify the regulation adoption process in response to objections.**

Response: There is no convincing evidence in the statutory and regulatory sections cited by the Commenter (i.e., Government Code §§ 11346.4, 11346.8(a), 11346.9(a)(3); and 11346.8(c); 23 CCR §§ 647.2(f) and 649.1) that Staff failed to follow the proper administrative rulemaking or State Board meeting procedures.

Comment X-14 (III): **Staff inappropriately narrowed the universe of interested parties and purposely excluded the "Keeper" groups from the public comment process.**

Response: The Commenter himself pinpoints the reasons why the "Keeper" groups were inadvertently excluded in April 1999: personnel/address changes within the "Keeper" groups, and the fact that several groups were not yet formed. How could the State Board have been expected to contact these groups, especially given out-of-date addresses originally provided by the groups themselves? (Mailed notices were <u>not</u> returned.)

In terms of the specific December 24, 1999 notification of the revised regulations, section 44 of Title 1 of the California Code of Regulations allows "narrowing of the universe of interested parties" to only those who previously commented.

The Commenter also suggests that because the "Keeper" groups "decided to wait until the proposed regulations were closer to final form to engage in the process, State Board staff in fact excluded the "Keeper" groups from that process, and

failed to give the Keeper's [sic] notice of the impending approval of the regulations." Based on this, a reasonable interpretation is that the "Keeper" groups actually did know about the proposed regulations at some earlier point, but choose to delay commenting. Regardless, the accusation that Staff deliberately excluded the groups from the process is patently false and lacks any substantiation.

Comment X-15 (III):

1. **The fact that the "Keeper" groups eventual written comments were not submitted to the State Board until the night before the regulation adoption date is the fault of Staff.**

2. **The State Board considered a "controversial" item in violation of State regulations.**

3. **Staff should respond to the "Keeper" groups' comments.**

Response:

1. As explained in the response to Comment X-9 (III), this unfortunate occurrence is actually the fault (if fault must be directed) of the "Keeper" groups--first for not keeping their addresses up to date and hence being omitted from prior mailings, and second because they faxed the comments to the wrong telephone number contrary to the web page announcement the Commenter cites.

2. Based on the Commenter's failure to (a) provide timely written comments, (b) put in a timely appearance at any of the three public meetings (June 8, 1999, February 2, 2000, and February 17, 2000) held on this item, and (c) provide comments with significant merit (see responses to Comments X-1 (III) through X-8 (III)), it is Staff's contention that the State Board had no controversial item to consider.

3. Only rulemaking comments received during valid public comment periods need be responded to (see response to Comment X-16 (III)). However, in the spirit of public disclosure, Staff has elected to make the extra effort to respond to these (and all) late comments for the rulemaking record.

Comment X-16 (III):

1. There is no legal authority which permits the State Board to fail to respond to comments submitted after January 14, 2000.

2. The "Keeper" groups' comments were not submitted late.

3. An inadequate, illegal, and flawed notice process prevented the "Keeper" groups from submitting timely comments.

Response:

1. Government Code section 11346.5(a)(14) requires that a notice of proposed rulemaking set the date by which comments must be received in order to be considered by the agency. In this current process, those dates were June 8, 1999 (for the initial 45-day review period) and January 14, 2000 (for the subsequent 15-day period). Furthermore, regarding a subsequent 15-day review period, sections 44 and 45 of Title 1 of the California Code of Regulations make clear that an agency's notice can establish a comment cut-off point and that only comments received during that period need be addressed.

2. See responses to Comments X-9 (III) through X-14 (III).

3. See responses to Comments X-9 (III) through X-15 (III).

Comment X-17 (III): **The Commenter alleges that failures to comply with State law and public participation procedures are becoming a pattern of State Board staff. He points to the Inland Surface Waters Plan and Nonpoint Source Plan processes as supposed evidence for this complaint.**

Response: Insofar as it concerns other State Board activities, this comment is outside the scope of this current rulemaking process. However, regarding this specific rulemaking, the State Board and its staff made every reasonable effort to secure and respond to public comments.

Comment X-18 (III): **The Commenter claims that this rulemaking process is inadequate and a rush to adopt regulations with "widespread environmental impacts."**

Response: See responses to Comments X-9 (III) through X-16 (III), plus responses to Commenter L. The proposed regulations set fees and procedures for review of requests for certification; they do not issue or deny certification for any project or category of projects. As such, approval of the regulation does not have any effect on the environment, and the comment does not identify any.

Comment X-19 (III): **The Commenter formally requests that Item 12 from the State Board's February 17, 2000 meeting be re-heard in order to address the "Keeper" groups' concerns.**

Response: In a response letter dated April 13, 2000 from Walt Pettit, State Board Executive Director, to the Commenter [see Rulemaking Record Item #32], the Commenter's request for re-hearing is denied.

This action was taken because of the abundant reasons given above (see responses to Comments X-9 (III) through X-18 (III), and in particular because (a) through no fault of the State Board or its staff the Commenter's objections were made well after two widely-advertised public comment periods and (b) no change to the regulations is supported by or would result from the Commenter's recommendations.